good, sufficient and proper service of the Bankruptcy Notice on the debtor. In all the circumstances of the case, and in view of the provisions of section 131 of the Bankruptcy Ordinance, 1959, I made receiving and adjudication orders against the debtor in terms of the creditor's petition.

Receiving and adjudication orders made.

Solicitors:—*Skrine & Co.; K. L. Devaser & Co.*

KAM HOY TRADING v. KAM FATT TIN MINE

[C.A. (Hill and Barakbah J.A., and Ismail Khan J.) June 3, 1963]

[K.L. — F. M. Civil Appeal No. 17 of 1963]

Practice and Procedure—Leave to amend pleadings after close of case and before judgment—R.S.C., O.28, r.1.

Although Order 28 rule 1 of the Rules of the Supreme Court 1957 gives the judge a discretion to give leave to amend indorsements or pleadings at any stage of the proceedings, this is a discretion which must be exercised judicially.

Where hearing is ended and judgment reserved, a judge has discretion, before judgment is delivered, to give leave for the statement of claim to be amended.

Such amendment may be permitted where it will set out in the pleadings that which has emerged in the course of the case as an issue between the parties or where the fact which is the subject matter of the amendment has been referred to by the counsel in opening and evidence about it has been given.

Cases referred to:—

(1) *Loutfi* v. *C. Czarnikew*, [1952] 2 All E.R. 823.

(2) *Weldon* v. *Neal* (1887) 19 Q.B.D. 394.

COURT OF APPEAL.

L. P. Thean for the appellants.

S. T. Chung for the respondents.

Barakbah J.A.: This is an appeal against the decision of Suffian J. in giving judgment for the plaintiffs against the defendants in the sum of $6,408.65 together with interest at the rate of 6% per annum and costs. The appeal was allowed with costs and it was intimated by the Court that it would give its reasons at a later date.

The claim as stated in the original statement of claim dated the 10th day of March 1959 was $6,689.45 with interests and costs.

On 3rd day of April 1959 the defendants, now the appellants in the present appeal filed their statement of defence.

On the day of the hearing i.e. 31st October 1961 counsel for the defendants applied for permission to amend the statement of defence by adding the following new paragraph.

"3. In the alternative, the defendant, Sze Toh Wah, pleads the Limitation Ordinance 1953 to the plaintiff's case."

Mr. Lye, counsel for the plaintiffs stated that he had no prior notice but left the matter to the Court. The Court granted the application and the statement of defence was accordingly amended. The hearing then proceeded and judgment was reserved till 6th November 1961.

On the day for delivery of judgment i.e. 6th November 1961, counsel for the plaintiffs applied for postponement as he was applying by way of motion to call fresh evidence which, as it was alleged, was not available at the time of trial. The Court again adjourned the hearing and later the application to adduce further evidence and to amend the statement of claim was granted. The claim in the amended statement of claim was for the sum of $6,408.65, being the balance due on account of the value of goods supplied to the defendants' firm.

On 30th July 1962, hearing was resumed and further evidence of P.W. 3, one of the partners in defendants' firm was taken. A document in Chinese Exhibit P.8 was admitted with no translation although the learned trial Judge inserted what purported to be a translation of it in his judgment. In my opinion the proper procedure would be for a certified translation to be put in as an Exhibit. On 27th February 1963 he delivered his reserved judgment in favour of the plaintiffs as claimed in the amended statement of claim.

There were several grounds of appeal but the main one was that the learned Judge wrongly exercised his discretion in allowing the respondents, after the close of the case while judgment was reserved, leave to adduce further evidence and to amend the statement of claim. The learned counsel for the appellants stated that such evidence was available and could and should have been brought by the respondents at the commencement of the trial.

Furthermore he said that counsel for the respondents stated that he had no prior notice of the application to file the amended statement of defence but left the matter to the Court which granted it. He should have applied for an adjournment but he did not. He went on to say that generally the Court would give leave to let in fresh evidence which was not available at the time of the trial, but in this case respondent was not taken by surprise, as he stated in his evidence. "I received no money despite my demands..... The debt of $6,689.45 was in respect of oil supplied before November 1952.

Since then I have not received a single cent in respect of that account." There was no entry of part payment in the book of accounts Exhibit P1 A and P1 B.

In reply counsel for the respondent referred to Order 28 rule 1 of the Rules of the Supreme Court, 1957, which reads as follows:—

"The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

and quoted the case of *Loutfi* v. *C. Czarnikew, Ltd.*[1] At page 824 Sellers J. states:

"I think it would be only in conformity with well-established rules that I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties."

If one reads the headnotes on page 823 one will notice that it differs from the present case in that in the latter case the question of part payment was never mentioned in the pleadings and in the evidence at the trial. It is well to state here the headnotes in full:—

"Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for.

Such an amendment may be allowed: (i) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties; (ii) where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts."

In *Weldon* v. *Neal*[2], it was held that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations. Lord Esher M.R. says at page 395:

"If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

Lopes L.J. kho was of the same opinion states on page 396:

"But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

It is true that Order 28 rule 1 gives the Judge discretion to amend but in my view it must be exercised judicially. In the circumstances, I allowed the appeal with costs.

Hill J. A. and **Ismail Khan J.** concurred

Appeal allowed.

Solicitors:—*Shook Lin & Bok; Chung & Huang.*

SINNIAH SOKKAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Gill J.) June 4, 1963]

[K.L. — Criminal Appeal No. 13 of 1963]

Citizenship—Federation of Malaya Constitution, Schedule 2, s.16—Citizenship (Registration Authority) Rules, 1957—Application for citizenship—Applicant knowingly making false statement as to date of birth—Application drawn up by petition writer—Inducing registration authority to grant certificate—Ingredients of offence—Meaning of "knowingly make a false statement".

The appellant who was resident in the Federation on *Merdeka Day* made an application for registration as a citizen of the Federation of Malaya. His date of birth was stated in the application as 1910. The application was approved and a certificate issued on February 20, 1958. On May 31, 1961 the appellant wrote to the Registration Officer enclosing his Citizenship Certificate and identity card requesting for his date of birth on the Citizenship Certificate to be amended to May 10, 1915. Evidence was adduced by the prosecution at the trial to show that the first identity card issued to the appellant showed his date of birth as 1910 but that the date of birth on the third identity card issued to him in 1960 was altered to May 10, 1915. The appellant's evidence in reply was that he came to Malaya in 1929 and that he could not read or understand English or Tamil although he could sign his name in Tamil. His application for an identity card and for Federal Citizenship were prepared by a clerk and a petition writer respectively and that the latter had used his identity card to complete the application form for Citizenship. Later on obtaining his birth certificate from India he had his date on his identity card altered to May 10, 1915 and he made an application for alteration of his date of birth on his Citizenship Certificate. The appellant was convicted by a Magistrate's Court for an offence under section 16 of the Second Schedule of the Federal Constitution. On appeal the main question for decision was whether the appellant knowingly made a false statement in relation to his date of birth with the intention of inducing the registration authority to grant him a Citizenship Certificate.

Held: (1) the evidence of the appellant was not challenged in any way and there was nothing inherently improbable in his story to suggest that it was not true;

(2) although the appellant was conscious of the statement which he made in his application he genuinely believed that the date disclosed therein was his correct date of birth and he did not know at the date of his application that his statement was false. As the learned